

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN-WATERLOO DIVISION

STEVEN B. HEPPERLE,

Petitioner,

vs.

JOHN AULT, Warden,

Respondent.

No. C01-2043-MWB

REPORT AND RECOMMENDATION
ON RESPONDENT’S MOTION TO
DISMISS

TABLE OF CONTENTS

I.	FACTUAL HISTORY	2
II.	PROCEDURAL HISTORY	4
III.	ANALYSIS	10
A.	Introduction	10
B.	AEDPA’s Statute of Limitations	12
C.	Equitable Tolling	14
D.	Procedural Default	16
IV.	CONCLUSION	18

This matter is before the court on motion (Doc. No. 11) of the respondent John Ault (“Ault”) to dismiss the petition for writ of *habeas corpus* filed by the petitioner Steven B. Hepperle (“Hepperle”). Ault’s motion seeks dismissal of this *habeas* action on two grounds: (1) Hepperle’s claims are time-barred; and (2) Hepperle’s claims of ineffective assistance of counsel are procedurally defaulted. (Doc. No. 11) Hepperle resists the motion, arguing (1) equitable tolling excuses his failure to comply with the statute of

limitations in 28 U.S.C. § 2244(d)(1); (2) the one-year statute of limitations violates the Suspension Clause of the United States Constitution; (3) his claims of ineffective assistance of counsel are not procedurally defaulted; and (4) cause and prejudice exist to excuse any procedural default. (Doc. No. 21).

I. FACTUAL HISTORY

The following facts are taken from the trial court's Findings of Fact, Conclusions of Law, Judgment and Decree, in Hepperle's postconviction relief proceeding, *Hepperle v. Iowa*, No. 71472 (Black Hawk County, Mar. 25, 1997); the Appellant's Brief and Argument in Hepperle's direct appeal, *Iowa v. Hepperle*, Sup. Ct. No. 86-605; and the decision of the Iowa Court of Appeals affirming the denial of relief in Hepperle's PCR action, *Hepperle v. Iowa*, No. 9-151/97-0628 (Iowa Ct. App. May 26, 1999).

On July 17, 1985, at about 8:00 a.m., the lifeless body of Diane Voss was discovered by her six-year-old son. The victim was lying face down on the floor next to her bed in the Voss residence in Waterloo, Iowa. She was naked except for a man's bathrobe that was draped around her. She had bruises on her neck, face, ankles and wrists, and she had been bound and sexually abused. An autopsy revealed the victim's cause of death to be ligature strangulation.

There was no sign of forced entry at the house. The victim's husband, Vern Voss, had made a collect telephone call to his wife from out of town at about 10:30 p.m. on the night of the 16th. The Vosses' three sons had slept through the night in the family home without being awakened. Several items were missing from the Vosses' bedroom drawers and closets, including the victim's undergarments and much of her clothing, as well as a coffee can containing about \$30.00 in change.

The Waterloo Police Department investigated the crime. They dusted the entire house for fingerprints, and interviewed neighbors and friends of the victim and her family.

The police considered four people as suspects including Vern Voss, the victim's husband; Mike Winters, a friend of Vern's; Dale Viers, a neighbor and known voyeur; and Hepperle, a former neighbor.

On July 18, 1985, police went to Hepperle's home in Evansdale, Iowa, to question Hepperle's girlfriend. During her interview, the girlfriend made an unsolicited statement claiming Hepperle was with her at the time of the Voss murder. Police asked Hepperle to come to the Waterloo Police Station for interrogation. Hepperle agreed, and rode with an officer to the station. At the station, Hepperle was interviewed for about two hours in a closed room in which Hepperle and an officer were the only persons present. At the time of the interview, Hepperle was on parole from a prior sexual abuse conviction. Hepperle told the officers that on the night of the murder, he had been at two specific bars with friends and then had returned to the Evansdale residence to spend the night. Police had difficulty confirming Hepperle's alibi. Officers interviewed Hepperle several additional times at his place of employment. At some point during his interviews, Hepperle told police he had been at the Voss residence on July 16th, to use the telephone. On July 26, 1985, police learned Hepperle's fingerprints had been identified as among those taken at the scene. One of the fingerprints was inside a dresser drawer where the victim had kept undergarments, which were missing. Another fingerprint was found on a plexiglass window pane at the rear of the house, at the location of an attempted burglary reported by the victim a few days prior to the murder. Hepperle was arrested and charged with the murder.

Further evidence against Hepperle included a letter he wrote to an acquaintance asking her to help him fabricate an alibi. The recipient refused the request and informed police about the letter. Police also talked with Dale Viers, a "peeping Tom" who had been listening outside the victim's window at or close to the time of the murder. Viers said he had heard statements made by a man whose voice was similar to Hepperle's. In addition,

Hepperle apparently confessed to another inmate in jail that he had killed Voss, providing details of the murder.

Hepperle had been convicted previously of third-degree sexual abuse in Marshall County, Iowa. The victim of that crime, Sherri Ferguson, testified at trial about the facts of the prior crime, which were similar to the facts surrounding the Voss murder.

At trial, Hepperle argued the fingerprints were made on earlier occasions, and he suggested his alibi witnesses were “confused” when they talked to police. The defense focused on Vern Voss as the “real” murderer, pointing to his recent purchase of a \$100,000 life insurance policy on his wife, and the fact that he seldom called home when he was out of town overnight on business. The defense argued Vern could have made the collect phone call from his motel room in Coralville, Iowa, to establish an alibi, and still had time to drive to Waterloo to commit the murder.

II. PROCEDURAL HISTORY

Hepperle was convicted of first-degree murder on March 28, 1986, and was sentenced to life imprisonment. (See Doc. No. 3, p. 1) Hepperle filed a direct appeal, and his conviction was affirmed by the Iowa Court of Appeals on November 30, 1987. The Iowa Supreme Court denied further review. (*Id.*, p. 2)

In his direct appeal, Hepperle raised the following two grounds for relief:

1. The trial court erred in overruling Hepperle’s motion to suppress statements he made during his initial interview by police during the murder investigation. Hepperle argued he was under suspicion at the time of the interview, he was effectively in custody at the time, and he was interviewed without being advised of his *Miranda* rights. Hepperle’s argument centered around whether or not he was “in custody” during the two-hour interrogation.

2. The trial court erred in allowing Sherri Ferguson to testify about Hepperle's prior sexual abuse conviction. The court allowed the evidence on the basis of Rule 404(b), Iowa Rules of Evidence, for purposes of establishing Hepperle's identity. Hepperle argued Iowa case law interpreting the rule requires a "striking similarity" between the prior crime and the case at bar before the identity exception applies, and such a close similarity was not present in his case. He also argued the probative value of the witness's testimony did not outweigh its prejudicial effect.

The Iowa Court of Appeals affirmed the conviction. On the first issue, the court found Hepperle was not "in custody" at the time of his interrogation:

The evidence does not support a conclusion that the defendant was "deprived of his freedom in any significant way." The defendant voluntarily went to the police station after a police officer asked if the defendant would come to the station to discuss the incident. The defendant rode in the police car with the officer so as to facilitate transportation, not because he was being taken into police custody. The interview was conducted in a friendly, cordial manner and the defendant was not threatened or coerced. The interview occurred during normal working hours. Nothing was ever said to the defendant to indicate that he was not free to leave. The investigation was still in its early stages and had not focused on the defendant. Rather, the police had several possible suspects at the time of the defendant's interview. The United States Supreme Court has stated that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275, 1279-80 (1983) (citation omitted). Because the police did not so restrict the defendant's freedom as to render him in custody, *Miranda* warnings were not required.

State v. Hepperle, 423 N.W.2d 906 (table), No. 86-605 (Iowa Ct. App. Nov. 30, 1987) (Order at 2-3).

On the second issue, the court held the circumstances of Hepperle's prior crime involving Ferguson were "strikingly similar" to those involved in the Voss murder, "and therefore, the testimony was properly admitted." *Id.* at 4. The court listed five similarities between the prior crime and the murder, and found the witness's testimony was relevant "on the issue of the identity of [the] killer." *Id.* at 5. The court also found "that while the evidence of the prior crime is indeed damaging to the defendant, the probative value of such evidence outweighs its prejudicial effect." *Id.*

On September 17, 1990, Hepperle filed a *pro se* application for postconviction ("PCR") relief in the Iowa District Court for Black Hawk County. The PCR court summarized Hepperle's claims as follows:

Hepperle now claims that he was denied effective assistance of counsel for several reasons, including the failure of trial counsel to focus on Dale Viers as the "real" murderer, and failure to call Hepperle to testify to refute assertions made by the state's witnesses and explain his prior admissions to the police. He also claims that the evidence of his prior acts was so prejudicial that it should have been excluded. He further claims that Dale Viers' credibility is so compromised by his subsequent conviction [in 1994, for sexual assault] that he should be allowed a new trial.

(PCR Appendix, Vol. I, at 5, ¶ 27)

On the ineffective assistance of counsel issue, Hepperle asserted the following claims in his PCR application:

- A. That the trial counsel failed to adequately investigate the other alleged suspects of the crime, in particular suspect Dale Viers.
- B. That trial counsel, after a hearing was held, and a motion granted requiring the Defendant be granted two (2) counsels on this Class A Felony, and after his appointment and the later withdrawal of initial counsel, James Whalen, for medical reasons, never again request[ed] additional assistance of other counsel.

- C. That counsel was also ineffective in failing to request an investigator to investigate the whereabouts and activities of other suspects, including but not limited to, Dale Viers.
- D. That counsel was not [sic] dilatory, and failed to file a reply brief on the appeal.
- E. That trial counsel failed to adequately move and present evidence for a change of venue.
- F. That counsel failed to adequately raise all objections to the inclusion of evidence of prior crimes.
- G. That the prosecution used the testimony of Dale Viers when knowing said testimony to be false.
- H. That for other reasons the Defendant did not receive a fair and equitable trial.¹

(App. for Post Conviction Relief, Case No. 71472, District Court of Black Hawk County, filed Sept. 17, 1990, at ¶ 8)

Hepperle's PCR action was denied on March 25, 1997, following a full evidentiary hearing. In its detailed order denying relief, the Black Hawk County Court first noted that because Hepperle's claim regarding the exclusion of evidence of his prior acts (see ¶ F, above) had been adjudicated on direct appeal, it could not be relitigated in a PCR proceeding. (PCR Appendix, Vol. I, at 6, ¶ 29) On the issue of "new evidence" regarding Dale Viers's credibility (see ¶ G and footnote 1, *supra*), the PCR court held Hepperle had failed to carry his burden to show the evidence likely would change the result if a new trial were granted. (PCR Appendix, Vol. I, at 6, ¶ 30)

¹The record does not include copies of the parties' briefs in the PCR action, which are not filed as a matter of course in Iowa courts, and their opening statements at the PCR evidentiary hearing were not reported. The PCR court's ruling and Hepperle's PCR appellate brief make it clear, however, that Hepperle also raised an issue of newly-discovered evidence relating to Viers, and among his assertions of ineffective assistance of counsel, he included his counsel's failure to call him to testify, despite his request to do so. Both of those issues have been raised by Hepperle in his petition in this court, and the court considers them to have been raised by Hepperle at the PCR stage.

Focusing on the ineffective assistance of counsel claims, the PCR court first held Hepperle had shown good cause for failing to raise those claims on direct appeal, given that his trial and appellate counsel were the same. (*Id.*, ¶ 31) The court then held Hepperle had failed to show he was prejudiced as a result of his counsel’s alleged errors. The court noted “[t]he unchallenged evidence in this case presents overwhelming evidence of guilt.” (*Id.*, ¶ 36) Therefore, the court found that even absent counsel’s alleged errors, it was not likely “the outcome of the trial would have been different.” (*Id.*, ¶ 35, citing *State v. Nebinger*, 412 N.W.2d 189 (Iowa Ct. App. 1987)) The PCR court found Hepperle’s trial counsel had conferred with him adequately, and had allowed him to participate appropriately in his defense, which included his decision not to testify. (*Id.*, ¶ 37; see *supra* note 1)

Hepperle appealed the order denying him postconviction relief, asserting all the grounds raised in the PCR action. The Iowa Court of Appeals affirmed the denial of PCR relief on May 26, 1999.² Hepperle did not seek further review by the Iowa Supreme Court, and *Procedendo* issued from that court on July 7, 1999.

Hepperle filed a *habeas* petition in this court on July 17, 2000 (Case No. 00-2059). On August 9, 2000, Ault filed a motion for partial summary judgment, alleging three of Hepperle’s four claims were procedurally defaulted. The parties agreed one of the claims, relating to alleged prosecutorial misconduct, was meritless. On January 4, 2001, this court filed a Report and Recommendation recommending that the meritless claim be dismissed. As to the two remaining claims which were the subject of the motion for partial summary judgment, this court found those claims were unexhausted but not yet procedurally defaulted, and recommended Hepperle be given the opportunity to notify the court as to whether he wished to proceed with his one exhausted claim (the claim not included in Ault’s motion for partial summary judgment) or dismiss his petition so he could pursue his two unexhausted

²Hepperle claims he did not receive notice of the appellate ruling until September 1999.

claims in state court. On January 26, 2001, Chief Judge Mark W. Bennett adopted the Report and Recommendation, and on January 30, 2001, Hepperle filed a notice that he was dismissing his petition without prejudice. On February 2, 2001, Chief Judge Bennett entered an order dismissing Hepperle's earlier petition without prejudice.

Hepperle returned to state court and on March 9, 2001, he filed a motion to reinstate his post-conviction appeal. In May 2001, Justice Mark Cady of the Iowa Supreme Court denied Hepperle's motion to reinstate. On August 22, 2001, a three-judge panel of the Iowa Supreme Court affirmed Justice Cady's ruling. Both of these decisions were rendered summarily, without an opinion explaining the Iowa court's reasoning. (See Doc. No. 8, Attachment)

Hepperle filed a new prior *habeas* petition in this court on July 16, 2001. (Doc. No. 3) In section III of Hepperle's *habeas* petition, he asserts the following four grounds for relief:

A. Mr. Hepperle's Miranda rights were violated because he was not provided with Miranda warnings while he was in custody;

B. Mr. Hepperle received ineffective assistance of counsel because:

1. Counsel failed to adequately investigate Dale Viers to see whether Dale Viers was the real murder[er];

2. Trial counsel failed to present Dale Viers as the real murder[er] during the trial; and

3. Trial counsel failed to call an investigator to testify that Dale Viers had possibly confessed to the murder.

(Doc. No. 3, p. 4)

Ault objected to the filing of the petition insofar as Hepperle sought to have the court declare his second petition "timely filed" (Doc. No. 4), but Ault subsequently filed his Answer to the petition on October 17, 2001 (Doc. No. 10), together with the motion to

dismiss now before the court and a supporting brief (Doc. Nos. 11 & 12). Hepperle filed his resistance to the motion on January 22, 2002 (Doc. No. 20), together with a supporting brief (Doc. No. 21), an unopposed motion to expand the record (Doc. No. 22), and an Appendix of additional documents (Doc. No. 23). Ault filed a reply brief on February 19, 2002 (Doc. No. 29), and an additional exhibit on February 21, 2002 (Doc. No. 30).

The court now deems Ault's motion to dismiss to be fully submitted and ready for decision.

III. ANALYSIS

A. Introduction

Ault argues Hepperle's petition is barred by the statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")³. In the alternative, if the court finds the claims are not time barred, then Ault argues Hepperle's claims in section III(B)(1), (2) & (3) are procedurally defaulted. Because Ault's arguments involve, in large part, the chronology of this case, the court finds it would be useful to set forth a chronology of how this case has proceeded through the courts:

03/28/86	Hepperle is convicted of first-degree murder and sentenced to life imprisonment
11/30/87	Hepperle's conviction is affirmed by the Iowa Court of Appeals
09/17/90	Hepperle files an application for postconviction relief
03/25/97	Hepperle's PCR action is denied by the District Court of Black Hawk County
05/26/99	Hepperle's PCR appeal is denied by the Iowa Court of Appeals
07/07/99	Procedendo issued
06/29/00	Hepperle files a <i>habeas</i> petition in this court ⁴
01/26/01	Chief Judge Bennett adopts this court's Report and Recommendation, finding two of Hepperle's claims to be unexhausted
01/30/01	Hepperle moves to dismiss his <i>habeas</i> petition without prejudice to allow him to exhaust state remedies
02/02/01	Chief Judge Bennett dismisses Hepperle's <i>habeas</i> case without prejudice

³The AEDPA is codified, in pertinent part, at 28 U.S.C. § 2244.

⁴The court accepts Hepperle's assertion that pursuant to the "mailbox rule" adopted by the Eighth Circuit in *Nicholas v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999), his petition was deemed filed when it was delivered to prison authorities for mailing on June 29, 2000, rather than on July 17, 2000, when the petition was actually filed by the Clerk of this Court. (See Doc. No. 21, p. 15 n.2)

03/09/01	Hepperle files motion to reinstate his PCR appeal
05/18/01	Hepperle's motion to reinstate is denied by one justice of Iowa Court of Appeals
07/16/01	Hepperle files a new <i>habeas</i> petition in this court
08/22/01	Denial of Hepperle's motion to reinstate is affirmed by three-judge panel of Iowa Court of Appeals

B. AEDPA's Statute of Limitations

The court first will address whether Hepperle's petition was filed outside the AEDPA's statute of limitations. The AEDPA provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The one-year limitations period runs from the latest of four events, only one of which is pertinent here, to-wit: "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" 28 U.S.C. § 2244(d)(1)(A).

As noted in the procedural chronology set forth above, Hepperle's conviction was affirmed by the Iowa Supreme Court on November 30, 1987. Hepperle had a period of 90 days following entry of the order to file a petition for a writ of certiorari with the United States Supreme Court. See Rule 13(1), Rules of the Supreme Court of the United States. Therefore, the date on which Hepperle's judgment became final by expiration of the time for him to seek review was February 28, 1987.

When a prisoner's judgment became final prior to the AEDPA's effective date of April 24, 1996, that prisoner has a one-year grace period to file a *habeas* petition (*i.e.*, until April 24, 1997), plus any additional time during which the limitations period is tolled. *Peterson v. Gammon*, 200 F.3d 1202, 1204 (8th Cir. 2000). On the tolling issue, the AEDPA provides:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). “The tolling period under § 2244(d)(2) includes time spent on an unsuccessful appeal of the denial of state postconviction relief.” *Mills v. Norris*, 187 F.3d 881, 882 (8th Cir. 1999).

Based on the statute and the Eighth Circuit’s interpretation of the grace period, Hepperle had until April 24, 1997, plus any period during which the limitations period was tolled, to file a *habeas* petition in this court. Hepperle filed his PCR action on September 17, 1990, and that action was not finally concluded until Procedendo issued after denial of the PCR appeal on July 7, 1999. Hepperle filed his first *habeas* petition on June 29, 2000, eight days before the statute of limitations would have run pursuant to the AEDPA and the applicable grace period and tolling provisions. Because the pendency of Hepperle’s first *habeas* petition did not continue to toll the AEDPA limitations period, *Duncan v. Walker*, 533 U.S. 167, 172, 121 S. Ct. 2120, 2129, 150 L. Ed. 2d 251 (2001), the limitations period expired on July 7, 2000. Hepperle’s petition was filed after the expiration date.

Hepperle concedes his petition was filed outside the applicable limitations period. (Doc. No. 21, p. 14) However, he relies on the concurring opinions of Justices Souter and Stevens in *Duncan* in asking this court to find the limitations period was equitably tolled during the time Hepperle’s first *habeas* petition was under review, and during the time he returned to state court to exhaust his remedies. To paraphrase Justice Souter, Hepperle’s claim for equitable tolling presents a serious issue for the court’s consideration in this case.

C. Equitable Tolling

“Equitable tolling can be applied to prevent the application of the AEDPA’s statutory deadline when ‘extraordinary circumstances’ have worked to prevent an otherwise diligent petitioner from timely filing his petition. *Helton v. Sec’y for Dept. of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001) (citation omitted). The Eighth Circuit Court of Appeals has explained:

It is settled in this circuit (and most others) that the statute of limitations in § 2244(d) is subject to the doctrine of equitable tolling. See *Gassler v. Bruton*, 255 F.3d 492, 495 (8th Cir. 2001). However, equitable tolling affords the otherwise time-barred petitioner an exceedingly narrow window of relief:

Equitable tolling is proper only when extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time. Further, equitable tolling may be appropriate when conduct of the defendant has lulled the plaintiff into inaction.

Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (citations omitted), *cert. denied*, --- U.S. ----, 122 S. Ct. 145, --- L. Ed. 2d ---- (2001).

Jihad v. Hvass, 267 F.3d 803, 805 (8th Cir. 2001). Further, “[i]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken. . . .” *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000), quoted with approval in *Corjasso v. Ayers*, 278 F.3d 874, 879 (9th Cir. 2002).

Justices Stevens and Souter suggested, in their concurring opinions in *Duncan*, that nothing in the majority opinion foreclosed the ability of a district court to deem the limitations period tolled as a matter of equity. Ault argues the concurrence “is at direct odds with the analysis of the Court’s majority.” (Doc. No. 29, p. 6) However, the majority noted its “sole task in this case is one of statutory construction,” and the majority expressly had “no occasion to address the question that Justice Stevens raises concerning

the availability of equitable tolling.” 533 U.S. at 181, 121 S. Ct. at 2129. The court concludes it has the authority to consider Hepperle’s equitable tolling argument in this case without violating *Duncan*.

Although it does not appear that the Eighth Circuit Court of Appeals has addressed equitable tolling on facts substantially similar to those in this case, two other courts of appeal have held that “a prisoner’s lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter.” *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001) (citing *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir.), *amended in part*, 223 F.3d 797 (5th Cir. 2000)).

In connection with Hepperle’s first *habeas* petition, this court held:

The record clearly demonstrates Hepperle diligently prosecuted the appeal of his case through the available State channels. Upon denial of his direct appeal, Hepperle sought further review by the Iowa Supreme Court. It is reasonable to believe he similarly would have sought further review of his PCR appeal if he had received timely notice that the Court of Appeals had affirmed the denial of relief.

(Doc. No. 32 in C00-2059) The court further finds Hepperle has continued to act diligently in pursuing his case since the dismissal without prejudice of his first petition. He returned to the State courts to seek available relief, and promptly refiled his *habeas* petition in this court when all his State remedies had been exhausted.

The court finds the facts of this case fall within the “narrow window of relief” afforded by the doctrine of equitable tolling, and therefore finds that insofar as Ault’s motion seeks dismissal of Hepperle’s petition on the basis of the AEDPA’s statute of limitations, that motion should be denied. Because the court so finds, the court does not reach Hepperle’s argument that the AEDPA’s one-year statute of limitations violates the Suspension Clause of the United States Constitution, except to note that other courts

considering the same argument have found it to be without merit. *See, e.g., Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001) (citing *Lucidore v. New York State Div. of Parole*, 209 F.3d 107 (2d Cir. 2000); *Molo v. Johnson*, 207 F.3d 773 (5th Cir. 2000) (*per curiam*); *Miller v. Marr*, 141 F.3d 976 (10th Cir. 1998)).

The court now turns to consideration of Ault's argument that all of Hepperle's claims are procedurally defaulted with the exception of his claim that his *Miranda* rights were violated.

D. Procedural Default

The Eighth Circuit has explained repeatedly:

Before a federal court may reach the merits of a claim in a *habeas* petition by a state prisoner, it "must first determine whether the petitioner has fairly presented his federal constitutional claims to the state court." *See Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (*per curiam*); *McCall v. Benson*, 114 F.3d 754, 757 (9th Cir. 1997).

Frey v. Schuetzle, 151 F.3d 893, 897 (8th Cir. 1998). Providing the State the opportunity to consider and rule upon alleged violations of constitutional rights is a necessary precursor to federal review. *See id.*; *see also Hood v. Helling*, 141 F.3d 892, 896 (8th Cir. 1998) (citing *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865 (1995)).

Ault argues Hepperle's ineffective assistance of counsel claims, set forth in his petition at Section III(B)(1), (2) & (3), "are procedurally defaulted for failure to properly exhaust same in appropriate State court proceedings." (Doc. No. 11, ¶ 2) Ault's procedural default argument is based solely on the fact that Hepperle did not file a timely application for further review with the Iowa Supreme Court after the Iowa Court of Appeals affirmed the dismissal of Hepperle's PCR action. (See Doc. No. 12, unnumbered pp. 5-8;

Doc. No. 29, p. 10) Ault asserts that when Hepperle finally learned of the Court of Appeals's decision, he still had two State remedies available to him: he could have requested an extension of time to file an application for further review, or he could have filed a second PCR action to assert his ineffective assistance of counsel claims, thereby "potentially" preserving his substantive claims for *habeas* review. Ault argues that in electing to file a federal *habeas* action rather than pursuing either of these two remedies, Hepperle effectively "'caused' his own procedural default." (Doc. No. 29, pp. 13-14)

Hepperle argues his claims were, in fact, properly exhausted. In the alternative, Hepperle argues that even if these claims were not properly defaulted, cause and prejudice exist to excuse the procedural default, and "a fundamental miscarriage of justice would result if this court does not address the merits." (Doc. No. 20, ¶ 3(b) & (d)) Finally, Hepperle argues Ault cannot raise the issue of procedural default because the State of Iowa has not regularly argued that the failure to seek further review procedurally defaults a claim for purposes of federal *habeas* relief. (*Id.*, ¶ 3(c))

Again, Ault ignores the equities arising from the facts at hand. Hepperle consistently and diligently pursued his State remedies to the extent he was able to do so based upon the information he had available to him. The court finds Hepperle has shown cause sufficient to overcome any procedural default, and further finds Hepperle's claims should be addressed on their merits in the interests of justice. Ault argues Hepperle has failed to show prejudice because none of his ineffective assistance claims have merit, and proceeds to argue the merit of those claims. The court finds Ault's argument on the merits to be premature, and further finds justice would be served by allowing Hepperle to argue his claims fully on the merits prior to considering Ault's arguments.

IV. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections⁵ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Ault's motion to dismiss be **denied**, and that a briefing schedule issue and this case proceed on its merits.

IT IS SO ORDERED.

DATED this 26th day of July, 2002.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

⁵Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).